82-2099

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. GIULIANI,
Appellant,
vs.
WALTER G. CHUCK,
Appellee.

MOTION TO DISMISS APPEAL

ROY F. HUGHES
LEE T. NAKAMURA
PAUL T. YAMAMURA
Grosvenor Center, Mauka Tower
737 Bishop Street, Suite 3000
Honolulu, Hawaii 96813
Telephone No.: (808) 537-6119

Attorneys for Appellee
WALTER G. CHUCK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. GIULIANI,
Appellant,
vs.
WALTER G. CHUCK,
Appellee.

MOTION TO DISMISS APPEAL

Appellee, WALTER G. CHUCK, hereby moves this Honorable Court to dismiss the Appeal herein, on the ground that the questions presented by the Appellant, ROBERT L. GIULIANI are so unsubstantial as not to need further argument or review.

I. FACTS AND BACKGROUND

A. Nature of the Case

This action arises out of an agreement of sale entered into between Appellant ROBERT GIULIANI (hereinafter Appellant), Inge Giuliani and Henry Dang through Paulette Ewin, his daughter, on November 21, 1973. Henry Dang went to his attorney, Appellee, WALTER CHUCK (hereinafter Appellee), to draw up the documents. Appellee prepared, in connection with the transaction, a bill of sale covering the buildings, a lease, a leasehold mortgage and the promissory note. By agreement with Paulette Ewin, Appellant took possession of the properties on December 28, 1973. However, on January 12, 1974, Appellant wrote to Appellee rescinding the agreement on the basis that the building at 257 Onewa was uninhabitable.

On February 6, 1974, after consultation with Mr. Dang, Appellee wrote to Appellant, advising him that the $1,000 deposit was forfeited because of Appellant's breach of contract. Appellant sued Henry Dang in the District Court of the First Circuit Court of the State of Hawaii for the return of the $1,000 deposit and prevailed. The decision was appealed to the Supreme Court of the State of Hawaii and was affirmed. Approximately $1,000 was paid for the satisfaction of judgment in favor of Appellant and against Henry Dang. Thereafter, Appellant filed the instant action against Appellee alleging fraud, misrepresentation, and interference in the usurption of his contractual rights. Appellee defended claiming the Complaint failed to state a claim upon which relief could be granted (that Appellee owed no duty to Appellant) and that the matters complained of were done by Appellee in the appropriate and legal course of Appellee's representation of his client, Mr. Dang.

B. **Procedural Background**

On November 24, 1976, Appellee moved for and was granted Summary Judgment. After a Motion for Reconsideration was filed and denied, Appellant appealed the lower court's decision to the Intermediate Court of Appeals for the State of Hawaii. The Intermediate Court of Appeals found that there were no facts or affidavits in the record to support the Motion for Summary Judgment and thereafter reversed and remanded the lower Court's decision. *See, Giuliani v. Chuck*, 1 Haw. App. 379 (1980) (Attached hereto as Exhibit "A"). The Court, while determining that a prima facie tort for intentional harm to a property interest was sufficiently alleged in the Complaint, and recognizing that there may be a privilege, stated that there were no facts in the record upon which to base a decision of the case. (Id.).

On March 11, 1981, following additional discovery, a Motion for Summary Judgment was again filed by Appellee. On April 24, 1981, an Order granting Appellee's Motion for Summary Judgment was entered. On May 11, 1981, Appellant filed a Motion for Rehearing and Reconsideration of Decision

which, after hearing, was denied by Order entered on July 15, 1981. On July 28, 1981, Appellant filed his Notice of Appeal. The Intermediate Court of Appeals, by Memorandum Opinion (attached hereto as Exhibit "B") dismissed the appeal for lack of appellate jurisdiction. Pursuant to the Memorandum Opinion, a judgment on appeal was filed.

On December 23, 1982, Appellant filed a Motion for Reconsideration which was denied on December 27, 1982. On January 5, 1983, Appellant applied for Writ of Certiorari to the Hawaii Supreme Court. The Writ was denied by Order filed January 14, 1983. The instant "appeal" followed pursuant to 28 U.S.C. 1257 and 28 U.S.C. 2103.

II. ARGUMENT

Apparently, Appellant contends that the actions of the state courts in exercising Summary Judgments and dismissing appeals for lack of jurisdiction have denied him his right to a jury trial and equal protection of the laws. While Appellant has not named the proper parties to the appeal (the State of Hawaii), Appellee submits this Brief in support of Motion to Dismiss Appeal.

A. THERE WAS AN ADEQUATE NON-FEDERAL BASIS FOR TERMINATION OF APPELLANT'S APPEAL.

1. *The dismissal of the appeal by the Hawaii Intermediate Court of Appeals was not founded on a Federal question, but on a jurisdictional defect.*

In the instant case, an Order Granting Motion for Summary Judgment was entered on April 24, 1981. On July 28, 1981, Appellant filed his Notice of Appeal to the Supreme and Intermediate Court of Appeals of Hawaii. Rule 73(a) H.R.C.P. requires that the Notice of Appeals be filed "within 30 days from the entry of the judgment appealed from."

The Intermediate Court of Appeals was presented with authority that the failure to file a timely Notice of Appeal constitutes a fundamental jurisdictional defect which can neither be waived by the parties nor disregarded by the Court in the exercise of judicial discretion. *Independence Management*

Trust v. Glenn Construction Corp., 57 Haw. 554 (1977); *Naki v. Hawaiian Electric Co., Ltd.*, 50 Haw. 85 (1967); *Ho v. Yee*, 42 Haw. 228 (1957); *Price v. Christman*, 2 Haw. App. 212 (1981). In citing the above authority and holding the provisions of Rule 73(a) to be clear, the Intermediate Court of Appeals dismissed the appeal from the lower court for lack of appellate jurisdiction.

2. *Jurisdictional defects are adequate grounds for the dismissal of an appeal.*

As previously noted, the Intermediate Court of Appeals dismissed Appellant's appeal. The basis for the dismissal was that as Appellant had not filed a timely Notice of Appeal, the Court lacked jurisdiction. Jurisdiction is the power to hear and decide a case of a particular class. *In Re Abreu*, 27 Haw. 237, 243 (1923). Therefore, as the Court of Appeals had no power to decide the issues sought to be presented, the dismissal of the appeal was proper.

It is well established that a timely filing of the Notice of Appeal is a prerequisite to an appellate court's jurisdiction. *Independence Management Trust v. Glenn Construction Corp.*, 57 Haw. 554, 555 (1977). Further, an appellate court is under an obligation to insure it has jurisdiction to hear and determine each case and to dismiss an appeal on its own motion where it concludes it lacks jurisdiction. *Naki v. Hawaiian Electric Co., Ltd.*, 50 Haw. 85, 86 (1967). In this regard, jurisdictional defects can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion. (Id.). It is generally considered that the state courts speak with final authority on questions of state law. *See, e. g., Mullaney v. Wilber*, 421 U.S. 684, 689 (1975); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Murdock v. Memphis*, 22 L.Ed. 429 (1875). Therefore, Appellee submits that the dismissal of the appeal due to a jurisdictional defect was an adequate ground for the Intermediate Court of Appeals' action. Further, as the action of the Intermediate Court of Appeals involved a question of state law, it is submitted that such determination would be binding on this Court.

3. *A jurisdictional defect does not involve a Federal question and a dismissal of an appeal on that basis is not a denial of due process or equal protection.*

Time limits for seeking review in the Supreme Court are jurisdictional. *See, e. g., Federal Trade Commission v. Minneapolis Hunnewell Regulator Co.*, 344 U.S. 206 (1952). The timely filing of a Notice of Appeal is an essential prerequisite to the jurisdiction of the reviewing court and an appeal will be dismissed unless it is timely taken. *Territo v. United States*, 358 U.S. 279 (1959); 13 *Moore's Federal Practice*, ¶ 811.05, S.C. 11-8 (2d ed. 1948). Moreover, there is no provision in the statute or the Court's Rules that permits an extension of the time for taking an appeal. (Id.). *See, Supreme Court Rule* 11.4.

The decision of the Intermediate Court of Appeals was based upon its lack of appellate jurisdiction due to an untimely Notice of Appeal. This Court has also recognized such a defect to be jurisdictional. As jurisdiction constitutes a court's ability to exercise it's judicial power, Appellee submits that no Federal question was involved, and equally, that there has been no denial of equal protection or due process.

4. *This Court should decline to review the Intermediate Court's decision as no Federal question was involved and there was an adequate ground, independent of any Federal question for the Intermediate Court's decision.*

Where a decision of a state court rests upon an adequate non-Federal ground, this Court has declined jurisdiction. *Woolsey v. Best*, 299 U.S. 1, 2 (1936). As stated in *Klinger v. Missouri*, 13 Wall. 257, 263 (1871):

> Where it appears by the record that the judgment of the State Court might have been based either upon a Law which would raise the question of repugnancy to the Constitution, Laws or Treaties of the United States, or upon some other independent grounds; and it appears that the Court, did, in fact, base its judgment on such independent ground, and not on the Law raising the Federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does

> not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction.

Moreover, as stated by this Court in *De Saussure v. Gaillard*, 17 U.S. 216, 234 (1887):

> We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State *having jurisdiction*, but that it's decision of the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. (Emphasis added).

In the instant matter, no federal question was presented to the courts below, and it is clear that adequate grounds independent of any federal question served as a basis for the lower court's decision. The Hawaii Intermediate Court of Appeals dismissed Appellant's appeal for lack of jurisdiction for failure to timely file a Notice of Appeal. The Intermediate Court of Appeal's decision was supported, indeed directed, by decisions of the Supreme Court of the State of Hawaii. Therefore, Appellee submits the Intermediate Court of Appeal's decision to be reasonable and without involvement of Federal constitutional or statutory issues. On this basis, Appellee requests that this Court decline to review the lower Court's decision.

B. THE CASE PRESENTS NO SUBSTANTIAL QUESTION FOR THIS COURT.

1. *The Trial Court's application of privilege for an attorney to give advice does not deny equal protection of the laws.*

One of the grounds for summary judgment was that Appellee, as an attorney, was protected by certain privileges and immunities applying to statements and advice by an attorney to

his client. Appellant apparently maintains that such privilege denies him equal protection of the laws. The privilege asserted does not involve a state statute, regulation or rule, but constitutes the application of a common-law principle. *See, Restatement Second of Torts,* §722, Comment a; *D & C Textile Corp. v. David Rudin* 246 N.Y.S. 2d 813 (1964).

A denial of "the equal protection of the laws" is one which alleges that the state law imposes an "invideous discrimination" upon a certain class. *Williams v. Rhodes,* 393 U.S. 23, 30-34 (1968). A state law invideously discriminates when it creates a suspect classification, *Korematsu v. United States,* 323 U.S. 214 (1944), or infringes upon a fundamental Constitutional right, *Shapiro v. Thompson,* 394 U.S. 618 (1969), and the state fails to show that the law is necessary to promote a compelling state interest. *San Antonio School District v. Rodrigues,* 411 U.S. 1, 16-17 (1973). In this regard, since "the very idea of classification is that of inequality, . . . the fact of inequality [by itself] in no manner determines the matter of constitutionality." *Atchison, Topeka & Santa Fe R.R. v. Matthews,* 174 U.S. 96, 106 (1899).

In the instant case, there is no statute, regulation, or rule involved, but merely the application of a common-law principle regarding an attorney's defenses to tort liability arising out of his representation of a client. Further, Appellant does not, nor can he, assert that he is a member of a suspect classification such as race, gender, or political affiliation. Further, while Appellant has asserted violations of his constitutional rights to a jury trial (which will be addressed *infra*), he does not assert a violation of this right in context to the application of the common-law principles and therefore, there is no violation of a fundamental right which is infringed upon by a state law. The application of a common-law rule does not deny equal protection of the laws. In fact, a rational basis exists for the application of the rule relied upon by Appellee. *See, McLaughlin v. Copeland* 455 F.Supp. 749 (D.C. Del. 1978).

2. *Summary Judgment proceedings do not violate due process or Appellant's right to a jury trial.*

Appellant apparently argues that decision by summary judgment denies him of his right to a trial by jury and the procedure violates due process of law.

At the core of the procedural due process right is the guarantee of an opportunity to be heard and it's corollary, a promise of prior notice. Tribe, *American Constitutional Law*, 10-15 550, 551 (1978). Parties must be appraised of the pendency of the action and be afforded an opportunity to present their side of the issue. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In the instant action, Appellant has been allowed extensive opportunities to present arguments and objections to the various proceedings below and has made his arguments. Appellant has not objected to any lack of notice and indeed, has actively participated in the proceedings below. Therefore, there have been no due process violations. Answering Appellant's apparent objection to the use of summary judgment procedure as violating his rights to a jury trial, it is clear that no such violation exists.

Rule 56(b) of the *Hawaii Rules of Civil Procedure* (H.R.C.P.) provides in pertinent part as follows:

> A party against whom a claim, counter-claim or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

The language in Rule 56 H.R.C.P. is identical to that used in Rule 56 of the *Federal Rules of Civil Procedure*.

Prior to the adoption of the *Federal Rules of Civil Procedure*, this Court has held that a summary judgment procedure does not infringe upon the constitutional right of a party to a trial by jury. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902). In making this determination, it was stated:

> If it were true that the rule deprived Plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed,

> the right to trial by jury accrues. The purpose of the rule is to preserve the Court from frivolous defenses and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. 187 U.S. at 320. (Emphasis supplied).

Furthermore, subsequent to the adoption of the *Federal Rules of Civil Procedure*, this Court in Ex Parte Peterson, 253 U.S. 300 (1920), left no doubt that the summary judgment procedure provided in Rule 56 does not infringe upon constitutional rights to trial by jury. *See*, 6 *Moore's Federal Practice*, ¶ 56.06[1] 56-87 (2d Ed. 1948).

In the instant case, an initial summary judgment was reversed by the Intermediate Court of Appeals for lack of sufficient facts. The trial court, with the guidance and benefit of the opinion in *Giuliani v. Chuck*, 1 Haw. App. 379 (1980), again granted summary judgment on the basis of affidavits and discovery taken subsequent to the remand. The trial court found no material facts in dispute and pursuant to Rule 56 H.R.C.P. granted summary judgment. Appellee maintains that Appellant was afforded a full opportunity to develop facts in dispute and failing to do so, cannot now assert that the lower court's actions deprived him of a right to a jury trial. Indeed, Appellee submits the procedures delineated by Rule 56 H.R.C.P., ". . . is simply one regulating and prescribing procedure whereby the Court may summarily determine whether or not a *bona fide* issue exists between the parties to the action." *General Investment Co. v. Inter Borough Rapid Transit Co.*, 235 N.Y. 133, 142 (1923). (Emphasis supplied).

III. CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is not so substantial as to require further argument or review, *See, Equitable Life Insurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902); and since independent and valid non-Federal grounds formed the basis for the lower court's decision, Appellee respectfully requests this Court to deny jurisdiction and dismiss the appeal herein filed.

Respectfully submitted.

ROY F. HUGHES
LEE T. NAKAMURA
PAUL T. YAMAMURA

Exhibit "A"

ROBERT L. GIULIANI and INGE E. GIULIANI, Plaintiffs-Appellants, *v.* WALTER G. CHUCK, Defendant-Appellee

NO. 6497

APPEAL FROM THE FIRST CIRCUIT COURT
HONORABLE NORITO KAWAKAMI, JUDGE

DECEMBER 1, 1980

HAYASHI, C.J., BURNS, J. AND CIRCUIT
JUDGE AU IN PLACE OF ASSOCIATE
JUDGE PADGETT, DISQUALIFIED

APPEAL AND ERROR — *review — scope and extent in general — summary judgment.*

The questions on appeal from a summary judgment are whether any genuine issue of material fact existed and whether the party prevailing below was entitled to judgment as a matter of law.

SAME — *same — same — same.*

On review of a summary judgment, facts, and inferences drawn from them, are viewed in the light most favorable to the non-moving party.

JUDGMENT — *grounds for summary judgment.*

A defendant moving for summary judgment is entitled to judgment as a matter of law if there is no genuine issue as to any material fact and if, viewing the record in the light most favorable to the plaintiff, it is clear that the plaintiff would not be entitled to recover under any discernible theory.

ATTORNEY AND CLIENT — *the office of attorney — privileges, disabilities and liabilities — liabilities to adverse parties and third persons.*

The rule of law that an attorney representing a client may be held personally liable to an adverse party or a third person who sustains injury as a result of an attorney's intentional tortious acts is well-settled.

PLEADING — *motions — insufficient allegations — application and proceedings thereon.*

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.

SAME — *same — same — same.*

A complaint is not subject to dismissal with prejudice unless it appears to be a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations.

SAME — *same — same — same.*

The rules do not require technical exactness or draw refined inferences against the pleader; rather, they require a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his favor. This is particularly true when a court is dealing with a complaint drawn by a layman unskilled in the law.

TORTS — *intentional harm to a property interest.*

Intentional harm to a property interest is a cognizable cause of action sounding in tort.

OPINION OF THE COURT BY BURNS, J.

Robert L. and Inge E. Giuliani, plaintiffs below, appeal the granting of summary judgment in favor of Walter Chuck, defendant below, in their tort action against him. The questions on appeal are whether any genuine issue of material fact existed and whether defendant was entitled to judgment as a matter of law. *Technicolor, Inc. v. Traeger*, 57 Haw. 113, 118, 551 P.2d 163, 168 (1976); rule 56, Hawaii Rules of Civil Procedure (HRCP).

For purposes of this appeal, the facts and inferences drawn from them are viewed in the light most favorable to the Giulianis. *Iuli v. Fasi*, 62 Haw. 184, 613 P.2d 653 (1980).

In 1973 the Giulianis, as buyers, entered into a Deposit, Receipt, Offer and Acceptance agreement (DROA) with Henry Chun Hook Dang (Dang), as seller, involving residential property in Kailua, Hawaii.[1] Pursuant to the DROA, the Giulianis paid a $1,000.00 deposit to Dang.

Dang's attorney, Defendant Walter Chuck (Chuck), a lawyer licensed to practice in Hawaii, prepared documents necessary to effect the sale.[2] The documents Chuck prepared did not conform to the terms in the DROA.[3] The Giulianis refused to sign the documents

---

[1] In pertinent part, the DROA stated that:

Buyer agrees to pay said purchase price as follows: $10,000 in cash including deposits herein and balance by way of agreement of sale for 3 years at 8% simple interest with monthly payments at least $566.67. At the end of this period, seller agrees to finance buyer with a 1st mortgage requiring 8% interest for 30 years on the remaining balance. . . .

[2] In pertinent part, the DROA stated that:

Buyer shall pay for the cost of drafting the agreement of sale, promissory note. . . .

[3] The promissory note drafted by Chuck called for payment of the total purchase price within three years. No agreement to finance buyer with a first mortgage was presented to the Giulianis.

and made unsuccessful attempts to cause Chuck to reform the documents to conform to the DROA prior to the scheduled closing date (January 15, 1974).

Chuck, by letter of February 6, 1974, advised the Giulianis that their $1,000.00 deposit was forfeit because they had breached the DROA.[4] The Giulianis tried to negotiate the return of the deposit but did not succeed.

In June 1974, the Giulianis sued Dang in district court for rescission of the contract and for return of their $1,000.00. They won. Dang appealed. The Hawaii Supreme Court affirmed the district court's judgment in a memorandum opinion. the Giulianis collected on their judgment.

HAWAII COURT OF APPEALS

Opinion of the Court

After they obtained the district court judgment, the Giulianis filed this suit in circuit court against Chuck. Their amended complaint alleged the above facts and that:

> The Defendant willfully usurped the Plaintiffs' rights in the DROA contract and denied the Plaintiffs access to their $1,000.00. The Defendant compelled Plaintiffs to needlessly enter into litigation to defend their property and rights which, in turn, caused Plaintiffs to suffer mental anguish as well as deprivation of enjoyment over a long period of time. All this inflicted needless harm upon the Plaintiffs. These acts by the Defendant were such as to amount to wanton disregard for the rights, feelings, and personal property of the Plaintiffs and for that reason, Plaintiffs claim;
>
> General Damages against the Defendant in the sum of EIGHTY FIVE THOUSAND DOLLARS ($85,000.00).

Chuck's answer denied the gravamen of the amended complaint and raised the separate defenses that he owed no duty to plaintiffs and that plaintiffs had already received their remedy in the action against Dang.[5]

---

[4]The record does not contain a January 12, 1974 letter from the Giulianis to Chuck, which Chuck refers to in his letter as the basis for his allegation that the Giulianis had breached the DROA agreement.

[5]The latter has not been argued on this appeal.

Chuck filed a motion for summary judgment and claimed entitlement to summary judgment because:

1. The amended complaint failed to state a claim upon which relief could be granted, i.e., Chuck owed no duty to the Giulianis; and

2. The matters complained of were done by Chuck in the appropriate and legal course of Chuck's representation of his client Dang, i.e., Chuck did not breach whatever duty, if any, he owed to Giuliani.

The lower court granted Chuck's motion after a hearing. The transcript of that hearing makes it clear that the basis of the court's ruling was its conclusion that the Giulianis had failed to establish any duty owed by Chuck to them. The Giulianis filed a HRCP, rule 60, motion for reconsideration, which the lower court denied after a hearing. In denying the latter motion, the court stated that Chuck owed no duty to the Giulianis and that the district court's decision in the Giulianis' action against Dang indicated that Chuck had sufficient reason to have advised his client Dang to take the actions that he did.

Where the defendant is the moving party, the defendant is entitled to judgment as a matter of law if there is no genuine issue as to any material fact and if, viewing the record in the light most favorable to the plaintiff, it is clear that the plaintiff would not be entitled to recover under any discernible theory. *Abraham v. Onorato Garages*, 50 Haw. 628, 446 P.2d 821 (1968).

On this appeal, the Giulianis rely on HRS § 663-1[6] and the case of *Campbell v. Brown*, 2 Woods 349 (Texas 1876), as authority sufficient to establish that an attorney, while representing a client, has a duty to refrain from committing tortious acts against third parties. They argue that the allegations of their amended complaint are sufficient to establish fraud, misrepresentation, interference in and usurpation of their contractual rights. They assert that the trial court erred in finding that the district court's decision in *Giuliani v. Dang* contained sufficient reason as a matter of law for Chuck to have advised his client to take the actions that he did.

---

[6] § 663-1 *Torts, who may sue and for what*. Except as otherwise provided, all persons residing or being in the State shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their spouses, children under majority, or wards, by such offending party, or his child under majority, or by his command, or by his animals, domestic or wild; and the party aggrieved may prosecute therefor in the proper courts. [Citations omitted.]

Chuck argues that he had no duty to the Giulianis under any discernible theory under any set of facts within the parameters of their allegations and that if he had a duty his actions did not constitute a breach of that duty.

I. DUTY.

The rule of law that an attorney representing a client may be held personally liable to an adverse party or a third person who sustains injury as a result of an attorney's intentional tortious acts is well-settled. *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947), *Greenwood v. Mooradian*, 137 Cal. App. 2d 532, 290 P.2d 955 (1955), *Newburger, Loeb and Co., Inc. v. Gross*, 563 F.2d 1057 (2nd Cir. 1977). *See Warner v. Roadshow Attractions Co.*, 56 Cal. App. 2d 1, 132 P.2d 35 (1942).

The fact that there are limitations on the extent to which an attorney can go in his or her representation of a client is clearly stated in the Code of Professional Responsibility (CPR), which is made applicable to all Hawaii attorneys by rule 16.2 of the Rules of the Supreme Court of the State of Hawaii.

II. PRIVILEGE.[7]

We are aware of the need to allow attorneys the freedom to represent their clients zealously within the bounds of the law. CPR, canon 7. We recognize a presently undefined area of privilege where an attorney's actions will be deemed justifiable under the circumstances and he or she shall not be held liable for his or her actions.

III. FACTS ON THE RECORD.

Although the complaint in this case was filed on November 18, 1975 and Chuck's motion for summary judgment was filed a year later on November 9, 1976, the factual record is very limited. Chuck's formal discovery was limited to the taking of Mr. Giuliani's deposition and this deposition is not part of the record on appeal. The Giulianis conducted no formal discovery. Chuck did not testify in *Giuliani v. Dang* and the transcript of that trial is not a part of the record in this case. Chuck's motion for summary judgment was not

[7]Restatement, Second, Torts § 890. *Privileges.* One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege of his own or of a privilege of another that was properly delegated to him.

accompanied by any affidavits. The record does not contain any affidavits by Chuck or Dang.

We disagree with the lower court's decision that the district court's decision in *Giuliani v. Dang* indicates, as a matter of law, that Chuck had sufficient reason to have advised his client to refuse to refund the Giulianis' $1,000.00 deposit. All that decision indicates is that for undefined reasons rescission of the DROA contract was appropriate and, therefore, that the Giulianis were entitled to a refund of their $1,000.00 deposit.

We disagree with the suggestion that Chuck's February 6, 1974 letter refutes the Giulianis' cause of action as a matter of law. The fact that Chuck stated in writing that he had a legitimate basis for his actions does not make it so. Had he done so under oath then possibly the Giulianis would have been required to respond with some competent evidence showing that there is a genuine issue as to the basis for Chuck's actions. *See* 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 2727. Such is not the case here so we do not reach that question.

IV. THE CAUSE OF ACTION ALLEGED.

In our view of this case, because of the scarcity of facts on the record, the primary issue raised by Chuck's motion for summary judgment was whether or not the complaint stated a claim upon which relief could be granted. *See* HRCP, rule 12(b)(6), and 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1356. Stated another way, the issue was whether the complaint contained a short and plain statement of the claim showing that the plaintiff was entitled to relief. *See* HRCP, rule 8(a).

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 1357. A complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations. *Id.* § 1215. The rules do not require technical exactness or draw refined inferences against the pleader; rather, they require a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his favor. This is particularly true when a court is dealing with a complaint drawn by a

layman unskilled in the law.[8] *Id.* § 1286.

In our view, the essence of the Giulianis' amended complaint is that Chuck intentionally and improperly refused to return their $1,000.00 deposit. Therefore, the amended complaint is sufficient to state a cause of action for intentional harm to a property interest, a cognizable cause of action sounding in tort. Restatement, Second, Torts § 871.

> One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

We further find the Giulianis' amended complaint insufficient to allege any other cause of action.

We especially find the Giulianis' amended complaint insufficient to allege a cause of action in fraud. The party asserting such a claim must have relied on the claimed misrepresentation. *Kang v. Harrington*, 59 Haw. 652, 587 P.2d 285 (1978), *Peine v. Murphy*, 46 Haw. 233, 377 P.2d 708 (1962). Here, the facts as alleged by the Giulianis establish quite the contrary. Rather than relying on the documents prepared by Chuck or any of his statements, the Giulianis refused to execute the documents and pursued their legal remedies vigorously.

V. CONCLUSION

Pleadings are not an end in themselves. They are only a means to assist in the presentation of a case to enable it to be decided on the merits. 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1473. This opinion states the law applicable to this case. What is missing are the relevant facts. We therefore reverse and remand this case for further proceedings consistent with this opinion.

Robert L. Giuliani, pro se, for plaintiffs-appellants.

Renton L. K. Nip (Huddy T. Lucas on the brief) for defendant-appellee.

---

[8] In this case the Giulianis have acted *pro se*.

DISSENTING OPINION OF CIRCUIT JUDGE AU

The majority of this court reverses an order of the trial court which granted summary judgment to the defendant. The majority reasons that the factual record is insufficient to support summary judgment, and the amended complaint is sufficient to state a claim for an intentional harm to plaintiffs' property interest, so far as they allege an intentional and improper refusal, by defendant, to return their $1,000.00 earnest money deposit. The defendant has admitted all of the material allegations of the amended complaint for the purpose of the motion. (Record at 145; 159.)

I dissent from the foregoing holding of the majority. My views are stated hereinbelow.

I am of the opinion that all of the material facts, which are stated in the majority opinion, together with such reasonable inferences as may be drawn therefore in the light most favorable to the plaintiffs, are sufficient for a proper resolution of the question of liability, in favor of the defendant.

The majority holds the plaintiff's claims actionable under § 871 of the Restatement, Second, Torts (1979). That section is but a particularized application of the general principle for intentional tort, as set forth in § 870, and the comments of the reporters of the Restatement thereunder are applicable to § 871.

Section 870 reads as follows:

> § 870. Liability for Intended Consequences—General Principle
> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

But, as the reporters comment, it is obvious that not every intentionally caused harm deserves a remedy in tort, and the determination of which ones should be the subject of tort liability is made by resorting to an evaluative process in balancing the conflicting interests of the litigants, in light of the social and economic interests of society in general. *Id.* at 281.

The balancing process, therefore, necessarily involves the court in an evaluative process, hereunder discussed, and in a determination of the actor's conduct as being both "culpable" and "unjustifiable," in the sense that it must be improper and wrongful; "it must be blameworthy, not in accord with community standards of right con-

duct" and "it must also be not excusable or justifiable; a privilege should not be applicable." *Id.* at 282. They further comment:

> It is the plaintiff's responsibility to satisfy the appropriate agency that the [standards have] been breached . . .

Id. at 280.

These two terms, not "excusable or justifiable," describe the evaluative process in balancing the societal interests before liability may be imposed. It must take the court into an analysis of a set of four factors, which are stated by the reporters, as follows:

> This evaluative process therefore involves utilization of all three of the blackletter terms. When analyzed, it breaks down into a set of four factors. These include: (1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive. The first factor is of primary concern in applying the blackletter term, injury, and the second factor is of primary concern in applying the blackletter term, not justifiable; the first, third and fourth factors are of substantially equal significance in applying the blackletter term, culpable. The balancing process, however, necessarily involves one single determination, and it cannot be neatly divided into several separate, mutually exclusive determinations.
>
> For one intentional tort—nuisance, when it involves intentional invasion of another's interest in the use and enjoyment of land—the single word "unreasonable" is used to describe the balancing process. (See §§ 826-829A). For the tort of interference with contractual relations the word "improper" is used. (See § 767). A single term, like "wrongful," might have been used here. But the traditional dichotomy in intentional torts of prima facie tort and privilege suggests the desirability of using more than one term.

Id. at 282-283.

All of this puts the imposition of liability under Restatement, § 871, in its proper perspective, to wit: That the determination of initial liability depends upon an interplay of several factors and a finding of privileges depends upon a consideration of much the same factors. But the majority holds the amended complaint legally sufficient and it recognizes a "presently undefined area of privilege where an attorney's actions will be deemed justifiable under the circumstances and he or she shall not be held liable for his or her actions [at

section II of majority]," without indicating how the bases of such undefined privileges may be related to the plaintiffs' legally protected interests.

I do not understand the majority as having undertaken a determination of initial liability in this case by the evaluative process, suggested by the reporters of the Restatement, under either §§ 870 or 871. For the same freedom of action of an attorney under CPR, canon 7, that the majority mentions in its opinion, does form the basis of an established privilege, under the facts and circumstances of this case, and, to my way to thinking, renders defined that which the majority regards as undefined.

As hereinafter mentioned, § 871 is but a particularized application of § 870. The latter section is described, by the reporters, as stating a principle sometimes called "an innominate form of the action of trespass on the case . . . [*Id.* at 280]" which is to say that the law, in this area, has not fully congealed but is still in a developing stage. And in "some cases in which the claim may be entirely novel," they comment, "the court may decide to limit liability to the situation in which the defendant acted for the purpose of producing the harm involved." *Id.* at 280.

I so view this case, and do not find, under the admitted and uncontroverted facts any "generally culpable and not justifiable" conduct of the defendant, which might subject him to liability under the circumstances. As the defendant explains it, he refused, or advised refusing the return of the $1,000.00 to plaintiffs because he deemed plaintiffs to have breached their DROA contract and (albeit, later held erroneous by our supreme court), under the terms and conditions thereof, felt Dang legally entitled thereto. Based upon the admitted and uncontroverted facts, and the reasonable inferences drawn therefrom, I am of the opinion that the defendant had not acted "for the purpose of producing the harm involved."

Therefore, utilizing the evaluative process in balancing the conflicting interests of the litigants and the societal interests, in the manner suggested by the reporters of the Restatement, I am of the conclusion that the defendant is entitled to judgment as a matter of law, upon the factual record of this case, and the reasonable inferences to be drawn therefrom in the light most favorable to the plaintiffs.

I, therefore, dissent.

Exhibit "B"

NO. 8390
IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI, Plaintiffs-Appellants, vs. WALTER G. CHUCK, Defendant-Appellee.	) CIVIL NO. 46750) APPEAL FROM THE ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, FILED APRIL 24, 1981; ORDER DENYING MOTION TO AMEND COMPLAINT, FILED JULY 15, 1981 AND THE ORDER DENYING MOTION FOR REHEARING AND RECONSIDERATION OF DECISION, FILED JULY 15, 1981) FIRST CIRCUIT COURT) HONORABLE TOSHIMI SODETANI) Judge

MEMORANDUM OPINION

This action in tort was previously before this court on plaintiffs' appeal from summary judgment below in favor of defendant. The judgment was reversed and the case remanded for further proceedings limited to the question of defendant's alleged intentional tort. *Giuliani* v. *Chuck*, 1 Haw. App. 379, 620 P.2d 733 (1980). The case is before us again on plaintiffs' appeal from a second summary judgment. We hold this court is without appellate jurisdiction in this matter.

The judgment and notice of judgment on appeal were filed below on January 2, 1981. On March 11, 1981, defendant filed a Motion for Summary Judgment. On April 24, 1981, after hearing, the following order was entered:

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant Walter G. Chuck having filed a motion for summary judgment and this motion having come on for hearing on March 31, 1981 and the Court having reviewed the memoranda of counsel and the Court having heard the argument of counsel and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that summary judgment be granted in favor of Walter G. Chuck and against Robert L. Giuliani and Inge Giuliani.

DATED: Honolulu, Hawaii, April 23, 1981.

/s/ Toshimi Sodetani

Judge of the Above Entitled Court

On May 11, 1981, plaintiff filed a Motion for Rehearing and Reconsideration of Decision, "pursuant to Rule 60, H.R.C.P. [Hawaii Rules of Civil Procedure] and the record on file herein." This motion was denied by order entered on July 15, 1981, after hearing. On July 28, 1981, plaintiff filed his Notice of Appeal.

Appellee challenges appellate jurisdiction for the reason that appellant's motion for reconsideration under "Rule 60, H.R.C.P." did not terminate the time for filing a notice of appeal under Rule 73(a), HRCP and, therefore, appellant's notice, filed later than thirty days after judgment, was not timely. Rule 73(a), HRCP (1980, as amended). Appellant argues he "misinterpreted" Rule 73(a) and should not be penalized for that, since his notice of appeal was filed within thirty days of the denial of his motion for reconsideration. Appellant also argues that strict application of Rule 73(a) would be prejudicial to his "substantive rights," citing Hawaii Revised Statutes (HRS) § 602-11 (1981 Supp.).[1]

In *Madden* v. *Madden*, 43 Haw. 148 (1959), our supreme court held that it is the substance of a pleading and not its nomenclature that determines its nature. Although appellant here denominated his motion as being under Rule 60, HRCP, it could be argued that it is really a motion to alter or amend judgment under Rule 59(e). However, this interpretation, even if arguably correct, does not resolve appellant's problem. Appellant's motion for reconsideration was also not timely filed. The order of April 24, 1981, determined with finality the claims of the parties and contained the magic words granting judgment. *See M. F. Williams, Inc.* v. *C & C of Honolulu*, 3 Haw. App. 319, 650 P.2d 599 (1982). The thirty-day period for filing a notice of appeal began to run on that date. Rule 73(a) provides that the thirty-day period is terminated by the timely filing of a motion under Rule 59(e). However, a motion under Rule 59(e) is required to be served not later than ten days after entry of the judgment. Rule 59(e), HRCP (1972, as

---

[1]Section 602-11, HRS, provides:

§ 602-11 Rules. The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

Whenever in a statute it is provided that the statute is applicable "except as otherwise provided," or words to that effect, these words shall be deemed to refer to provisions of the rules of court as well as other statutory provisions.

amended). The record indicates that the motion in the instant case was served on May 11, 1981, seventeen days after judgment. Therefore, the appeal period was not terminated and plaintiff's notice of appeal came far too late. *Cf. Naki* v. *Hawaiian Electric Co., Ltd.*, 50 Haw. 85, 431 P.2d 943 (1967).

Failure to file a timely notice is a fundamental jurisdictional defect which can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion. *Independence Mtge. Trust* v. *Glenn Construction Corp.*, 57 Haw. 554, 560 P.2d 488 (1977); *Naki* v. *Hawaiian Electric Co., Ltd., supra; Ho* v. *Yee*, 42 Haw. 228 (1957); *Price* v. *Christman*, 2 Haw. App. 212, 629 P.2d 633 (1981).

The provisions of Rule 73(a) are almost crystalline. The appeal period is absolute unless extended by actions taken by the appellant pursuant to those provisions. Plaintiff is no stranger to the appellate process. In addition to the prior appeal in this matter, he was the successful *pro se* appellee in a related case decided by our supreme court in a memorandum decision.

A party may appear before any court in this state to prosecute or defend his own cause, without the aid of legal counsel, HRS § 605-2 (1976), notwithstanding his lack of familiarity with the rules of law and the practice of courts. *Oahu Plumbing and Sheet Metal, Ltd.* v. *Kona Construction, Inc.*, 60 Haw. 372, 590 P.2d 570 (1979). However, once he has chosen to represent himself, he must be held to the same standard as if he were represented by counsel. *Johnson* v. *Aetna Casualty and Surety Co. of Hartford Connecticut*, Wyo. , 630 P.2d 514, *reh'g denied*, 454 U.S. 1118, 102 S.Ct. 961, 71 L.Ed.2d 105 (1981); *Bly* v. *Henry*, 28 Wash. App. 469, 624 P.2d 717 (1981); *Homecraft Corp.* v. *Fimbres*, 119 Ariz. 299, 580 P.2d 760 (Ariz. App. 1978); *Bloch* v. *Bentfield*, 1 Ariz. App. 412, 403 P.2d 559 (1965). If he assumes the duties and responsibilities of an attorney, he is then held to the same standards of ethics and knowledge of legal principles and procedures of an attorney, *Batten* v. *Abrams*, 28 Wash. App. 737, 626 P.2d 984 (1981), and he must be prepared to accept the consequences of his mistakes and errors. *Heikes* v. *Fort Collins Production Credit Association*, 169 Colo. 27, 456 P.2d 274 (1969). Although a party may not be placed at a disadvantage by his *pro se* appearance, other than those attributed to his decision to proceed without counsel, he may not gain any advantage by virtue of his own representation. *Johnson* v. *Aetna Casualty*

and Surety Co. of Hartford Connecticut, supra; Richardson v. *White*, 497 P.2d 348 (Colo. App. 1972); *Bloch* v. *Bentfield, supra.*

Section 602-11, HRS, does not assist plaintiff, because he has no right to appeal except where granted by constitution or statute. *State* v. *Shintaku*, 64 Haw. 307, 640 P.2d 289 (1982); *Chambers* v. *Leavey*, 60 Haw. 52, 587 P.2d 807 (1978).

Dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawaii, December 15, 1982.

Robert L. Giuliani,
plaintiff-appellant,
pro se.

Roy F. Hughes (James F. Ventura with him on the brief; Libkuman, Ventura, Moon and Ayabe of counsel) for defendant-appellee.